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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 375

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER

v.

E. SOHIER WELCH ET AL., EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119–128) is reported in 90 F. (2d) 833.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for a writ of certiorari was filed September 1, 1937, and was granted October 18, 1937. The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, imposing an estate tax with respect to trusts where the settlor has retained a life interest, may be applied to trusts established prior to the dates of passage of the amendments but where the death of the grantor occurred subsequent thereto.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein will be found in the Appendix, *infra,* pp. 39–44.

STATEMENT

The facts, as found from the evidence by the District Court, pursuant to a stipulation waiving a trial by jury (R. 15), are as follows:

E. Sohier Welch and Sylvester Brown are the executors of the last will of Frank H. Beebe, who died on November 20, 1932. (R. 20.) On April 8, 1919, the decedent was appointed co-guardian of the person and estate of his brother, E. Pierson Beebe, who had been adjudged insane, and continued as such until the latter's death on August 8, 1926. (R. 21.) As co-guardian of his brother's estate, the decedent had the custody of a will drawn

by E. Pierson Beebe, prior to his having been declared incompetent, under which the decedent was to receive one-half of his estate. (R. 21.) On February 13, 1924, the decedent transferred in trust the property he expected to receive under the will of E. Pierson Beebe, reserving to himself the income from the property for his life. After his death, the income was to be divided between his nephews and nieces, and after the death of the last survivor, the corpus was to be paid to the living issue of such nephews and nieces. The trust instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24–25.) After the death of E. Pierson Beebe, the decedent on October 22, 1926, by an instrument in writing, ratified and confirmed the original trust instrument, making no change whatever in its provisions. (R. 25–26.)

After the decedent's death, on November 20, 1932, the Commissioner determined that the value of the corpus of the trust should be included in the gross estate on the ground that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) The District Court affirmed the action of the Commissioner and, in so doing,

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found it unnecessary to decide whether the case was governed by Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, which section, as amended, specifically covered the case of a transfer with the reservation of a life estate in the transferor. (R. 30.)

Upon appeal, the Circuit Court of Appeals held that the tax was invalid since the interest of the decedent in the estate of his brother passed out of his hands by his confirmation of the 1924 trust on October 22, 1926, and that the District Court was in error in holding that the transfer was made in contemplation of death, and intended to take effect in possession or enjoyment after death. The court further held that to apply the provisions of Section 302 (c), as amended, to transfers completed in 1926, was violative of the Fifth Amendment to the Constitution. (R. 127–128.)

While we believe that the Circuit Court of Appeals erred in overruling the District Court on the contemplation of death issue, the Government did not seek review of that question, because of its limited importance in the light of the record, but did ask this Court to review the holding that the amended provisions of Section 302 (c) could not be applied to the trust herein.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, is unconstitutional as applied to transfers made prior to the dates of passage of the amendments.

2. In holding, if it did hold, that the value of the property transferred by the decedent by an irrevocable deed of trust under which he reserved the income from the property to himself for life, should not be included in the gross estate of the decedent under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932.

3. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

I

The validity of the 1931 and 1932 statutes.—In *Helvering* v. *Bullard,* No. 349, present Term, we have maintained that the statute is constitutional as applied to transfers made after March 3, 1931, the date of the first amendment to Section 302 (c). We now consider its validity, challenged under the Fifth Amendment, when applied to trusts created prior to March 3, 1931.

There is nothing *per se* unconstitutional about retroactive taxation. The income tax statutes for

a period of more than seventy years have been uniformly applied, with repeated approval from this Court, to income earned prior to enactment. Nor is there anything peculiar to income taxes which prevents the operation of the Fifth Amendment. A variety of excise taxes and other revenue measures have likewise been given retroactive effect without running afoul of the due process clause. The true test always is whether under the circumstances the tax is arbitrary or unreasonable. And in the relatively few cases in which a tax has been invalidated for its retrospective operation, the basis of decision was that at the time of the transaction giving rise to the tax, one could not reasonably anticipate the liability, and therefore the later taxing statute was arbitrary and capricious. However, where the statute imposing the liability is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 302), the reason for the operation of the Fifth Amendment is absent.

In this case the events leading up to the enactment of the 1931 provisions are of the utmost significance in determining the reasonableness of the tax as here applied. The first Federal estate tax was enacted in 1916. It required, *inter alia*, the inclusion in a decedent's gross estate of transfers "intended to take effect in possession or enjoyment at or after death". That clause was not novel. It had appeared as early as 1826 in the death tax

statute of Pennsylvania, and by the time the Federal estate tax statute was enacted in 1916, it had been incorporated into the laws of at least *forty* States. And in an almost overwhelming number of decisions, both before and after the passage of the 1916 Act, whenever the courts of those States had occasion to construe that clause, it was treated as including a transfer in which the transferor had reserved for his own life the possession or enjoyment (life estate) of the property transferred.

Accordingly, when Congress employed this clause in the 1916 Act it took over language that was rich in meaning, and could reasonably have felt that a like interpretation would be given to it. The Treasury Department repeatedly so construed this clause, and in reliance upon that interpretation was collecting millions of dollars in taxes with respect to such transfers Moreover, in the light of that administrative practice, Congress reenacted this clause in 1919, 1921, 1924, and 1926, and left it unchanged in the Revenue Act of 1928.

However, on March 2, 1931, this Court in three cases held that Congress had not intended to tax such transfers. Congress was greatly disturbed by this interpretation of its intent, and on March 3, 1931, upon the anxious suggestion of the Treasury Department, it passed a Joint Resolution, spelling out with particularity that the disputed clause does include a "transfer under which the transferor has retained for his life * * * the

possession or enjoyment of, or the income from, the property * * *".

Under these circumstances, we respectfully submit that the amendatory provisions are not arbitrary or capricious when applied to a trust created before March 3, 1931, at a time when the decedent could reasonably have anticipated such a tax. The source of the original clause in 1916, the continued and uniform interpretations given it both by the state courts and the Treasury Department, the vast sums collected by the Treasury Department with respect to such transfers—these *facts* of which the decedent could reasonably be put on notice gave fair warning that when he died the Government would seek a similar tax from his estate. The clarifying provisions enacted in 1931 and 1932 do not involve those elements of "novelty and surprise" that were fatal in the case of the few taxes invalidated because of their retroactive operation.

Furthermore, the tax here is even more reasonable since the decedent's death occurred after the enactment of the amendatory provisions and meanwhile he could have rid his estate of the liability by relinquishing his life estate. The fact that he failed to do so does not render this tax arbitrary.

II

The question of construction.—Not only does the Joint Resolution by its terms apply where the decedent has "at any time" created such a trust

reserving a life estate, but Section 302 (h) of the Revenue Act of 1926 unambiguously states that "Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) * * * shall apply to * * * trusts * * * whether made * * * before or after the enactment of this Act". And there is no provision in Section 302 (c) which excludes the operation of Section 302 (h), by "otherwise specifically" providing. We submit that this is so plain that it is conclusive. Under these circumstances, recourse to legislative history is not appropriate. But even if the legislative history be examined, it will be found not to militate against the plain meaning of these words.

ARGUMENT

INTRODUCTION

The decedent, Frank H. Beebe, died on November 20, 1932. The pertinent statutory provisions (Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, Appendix, *infra,* pp. 38–39), were enacted prior thereto. Accordingly, this case does not involve the retroactive imposition of an estate tax in the sense that the law was enacted after the decedent's death. The present controversy should thus be sharply distinguished from cases such as *Commissioner* v. *Wallace,* 71 F. (2d) 1002 (C. C. A. 2d), affirming 27 B. T. A. 902, certiorari denied, 293

U. S. 600, where the settlor died before the effective date of the statute.[1] Since the decedent herein continued to enjoy the income from the trust until the date of his death, which followed the enactment of the applicable statutory provisions, the instant case involves a "retroactive" application of the law only within a restricted meaning of that term.

Whether, when so applied, Section 302 (c), as amended, offends the constitutional guaranty of due process, and whether Congress intended those provisions to apply to trusts created before the amendments of 1931 and 1932, are the two questions now before this Court. The Circuit Court of Appeals held that to impose the tax here "would be a violation of Art. V of the Constitu-

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[1] Similarly, in *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, the decedents had reserved income for life, but death occurred in each case before March 3, 1931. See Record, p. 2, No. 14, 1935 Term; Record, p. 3, No. 36, 1935 Term. Accordingly, the Government did not seek to apply Section 302 (c) in those cases, but rather relied upon Section 302 (d).

Although the grantor in *Helvering* v. *City Bank Co.*, 296 U. S. 85, did reserve the income for life, and did live for a short time after March 3, 1931 (she died May 20, 1931), the Government did not press the application of Section 302 (c), because it was at that time interested primarily in establishing the validity of Section 302 (d), which was squarely presented in that case. It also refrained from relying upon Section 302 (c) because under Regulations 80, Article 18 (b), the pertinent provision in Section 302 (c) was to be applied only where death followed the enactment of the 1932 Act, namely, June 6, 1932, if the transfer had been made prior to March 3, 1931.

tion" (R. 127), presumably intending to refer to the due process clause in the Fifth Amendment. It also stated at the conclusion of its consideration of the constitutional issue (R. 128):

> If doubt exists as to the construction of these statutes, it should be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151.

But since it nowhere discussed the question of statutory construction to determine whether there was a "doubt" as to the proper interpretation of the law, it is at least uncertain under the circumstances whether the court below ruled upon the question of construction.[2]

Accordingly, we will consider first the constitutional validity of the tax as here imposed, and secondly, to remove any doubt, we will undertake to show that Congress plainly intended the result.

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[2] The uncertainty as to whether the court ruled upon anything beyond the constitutional question is increased by the fact that the judge who delivered the opinion recently invoked the same authority in a case involving *solely* a question of constitutional law. *Davis* v. *Edison Electric Illuminating Co. of Boston*, 89 F. (2d) 393, 396 (reversed, *sub nom. Helvering* v. *Davis*, 301 U. S. 619, 672):

"* * * where the application of a taxing statute is doubtful it should be resolved against the government. *Gould* v. *Gould*, 245 U. S. 151 * * *."

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I

SECTION 302 (C) AS AMENDED IN 1931 AND 1932 IS CONSTITUTIONALLY VALID AS APPLIED TO TRUSTS CREATED BEFORE THE CLARIFYING AMENDMENTS WERE PASSED

The asserted invalidity of the tax herein is predicated upon the prohibition contained in the "vague contours of the Fifth Amendment". It is charged that the imposition of this tax is so arbitrary and capricious as to take property from the respondent without due process of law.

In the Government's brief in *Helvering* v. *Bullard,* No. 349, 1937 Term, we have endeavored to show that the amendments are valid as applied to transfers made after their enactment. It is our purpose to show here that they may be constitutionally applied to transfers made before March 3, 1931, the date of the Joint Resolution making the first amendment.

1. There is nothing *per se* fatal about retroactivity. Indeed, the occasions upon which a tax has been declared invalid by reason of its retrospective operation have been relatively infrequent as contrasted with the large number of times when revenue Acts have been applied retroactively. And in the few instances where the tax was invalidated, there were unusual circumstances (not present here, as we will show in detail, *infra,* pp. 19–29) that were deemed to render the taxes so arbitrary that they could not be imposed consistently with due process.

The most familiar of all our revenue measures, namely, the income tax statutes, have uniformly been given retroactive effect. Many of them have reached income earned prior to enactment back to the beginning of the current year, while a few were made applicable to the beginning of the *preceding* year.[3]

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[3] *Before the Sixteenth Amendment.*—The Act of August 5, 1861, c. 45, 12 Stat. 292, 309, was made retroactive to January 1, 1861. The Act of July 1, 1862, c. 119, 12 Stat. 432, 473, enacted increased rates and was retroactive to January 1, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed a further tax of 5% on incomes for 1863. The Act of June 30, 1864, c. 173, 13 Stat. 223, 281, was retroactive to January 1, 1864. The Act of March 3, 1865, c. 78, 13 Stat. 469, 479, was retroactive to January 1, 1865. The Act of March 2, 1867, c. 169, 14 Stat. 471, 477, was retroactive to January 1, 1867. The Act of July 14, 1870, c. 255, 16 Stat. 256, 257, was retroactive to January 1, 1870, in spite of the fact that Congress in the Acts of June 30, 1864, c. 173, 13 Stat. 223, 283, July 13, 1866, c. 184, 14 Stat. 98, 138, and March 2, 1867, c. 169, 14 Stat. 471, 480, had declared that income after January 1, 1870, was not to be taxed. The Act of August 27, 1894, c. 349, 28 Stat. 509, 553, was retroactive to January 1, 1894. The Act of August 5, 1909, c. 6, 36 Stat. 11, 112, Sec. 38, was retroactive to January 1, 1909.

After adoption of Sixteenth Amendment.—The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, was retroactive to March 1, 1913. The Act of September 8, 1916, c. 463, 39 Stat. 756, was retroactive to January 1, 1916. The Act of October 3, 1917, c. 63, 40 Stat. 300, was retroactive to January 1, 1917. The Act of February 24, 1919, c. 18, 40 Stat. 1057, 1058, was retroactive to January 1, 1918. The Act of November 23, 1921, c. 136, 42 Stat. 227, was retroactive to January 1, 1921. The Act of June 2, 1924, c. 234, 43 Stat. 253, 254, was retroactive to January 1, 1924. The Act of February 26, 1926, c. 27, 44 Stat. 9, 10, was retroactive in

Never has the validity of these provisions been open to doubt. As early as *Stockdale* v. *Insurance Companies,* 20 Wall. 323, the Court declared (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

And for a period of more than seventy years the rule there enunciated has been confirmed and applied. *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Cooper* v. *United States,* 280 U. S. 409, 411–412; *MacLaughlin* v. *Alliance Ins. Co.,* 286 U. S. 244; *Reinecke* v. *Smith,* 289 U. S. 172; *Burnet* v. *Wells,* 289 U. S. 670; *United States* v. *Hudson,* 299 U. S. 498. Cf. *Taft* v. *Bowers,* 278 U. S. 470, 483, 484.

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certain respects to January 1, 1925. The Act of May 29, 1928, c. 852, 45 Stat. 791, was retroactive to January 1, 1928. The Act of June 6, 1932, c. 209, 47 Stat. 169, was retroactive to January 1, 1932. The Act of May 10, 1934, c. 277, 48 Stat. 680, was retroactive to January 1, 1934. The Act of June 22, 1936, c. 690, 49 Stat. 1648, was made retroactive to January 1, 1936. The Act of August 26, 1937, Public No. 377, 75th Cong., 1st Sess., was made retroactive in certain respects to January 1, 1937.

Particularly striking was the application of this rule in *Cooper* v. *United States,* 280 U. S. 409. In that case the taxpayer on November 1, 1921, received a gift of securities. On November 7, 1921, she sold those securities for an amount equal to their fair market value at the time of the gift. Under the law and regulations then in force the sale would not have resulted in any taxable gain to her, since the basis for computing gain on sale of property received as a gift was the fair market value of the property at the time of gift. However, on November 23, 1921, the Revenue Act of 1921 was enacted and made retroactive to January 1, 1921. Under the new law, the basis for computing gain was not the value of the securities when received by the taxpayer, but instead their cost to the taxpayer's *donor.* And in that case, the taxpayer was held taxable under the subsequently enacted statute for gain in the amount of some $36,000, although under the law in effect at the time she sold the securities she would not have been subject to any tax from the transaction. Notwithstanding the retroactive application of the Revenue Act of 1921 to produce a new and substantial tax liability after the transaction had been consummated, the Court found that there were no such elements of arbitrariness or caprice as to justify invoking the due process clause.[4]

[4] Similarly, it has been held that the statutory provisions requiring a corporation to use the transferor's basis with respect to property received in a non-taxable exchange may

Although we are probably more familiar with the retroactive application of our tax laws in the field of income taxes, there is nothing in the inherent character of the Fifth Amendment that limits the permissible scope of retroactive tax legislation to income taxes. There is no special aura of favor surrounding the income tax. The test is always the same: Is the tax so arbitrary, capricious, or unfair under the circumstances that the due process clause must be invoked?

Thus, under appropriate circumstances, various excises have been sustained in spite of their retroactive character. See, for example, *Patton* v. *Brady*, 184 U. S. 608; *Billings* v. *United States*, 232 U. S. 261; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. Cf. *Cahen* v. *Brewster*, 203 U. S. 543.

In *Hecht* v. *Malley*, 265 U. S. 144, 164, the taxpayer was an "association" which had been compelled to pay for the year 1918 the corporate "excise" tax imposed by Section 407 of the Revenue Act of 1916. The Court held that the 1916 Act did not apply to this "association", but that the corresponding excise under the Revenue Act of 1918, *passed February 24, 1919* (c. 18, 40 Stat. 1057), did apply to an "association" such as the taxpayer.

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be applied even though the exchange took place before the enactment of such provision. *Newman, Saunders & Co.* v. *United States*, 36 F. (2d) 1009 (C. Cls.), certiorari denied, 281 U. S. 760; *Osburn California Corporation* v. *Welch*, 39 F. (2d) 41 (C. C. A. 9th), certiorari denied, 282 U. S. 850; *Himelhoch Bros. & Co.* v. *Commissioner*, 83 F. (2d) 485 (C. C. A. 6th), certiorari denied, 299 U. S. 572.

Accordingly, the Court denied a refund of the tax collected under the 1916 Act, since in its judgment the retroactive provisions in the Act of February 24, 1919, lawfully created the challenged liability.

Nor are examples wanting in the estate tax field itself. In *Milliken* v. *United States,* 283 U. S. 15, this Court said (p. 21):[5]

> But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court.

See also *Klein* v. *United States,* 283 U. S. 231, 234–235; *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, 166.

In *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming, *per curiam,* 58 F. (2d) 1085 (C. C. A. 1st), affirming 45 F. (2d) 911 (Mass.), this Court sanctioned the inclusion in a decedent's gross estate of the *entire* value (not merely one-half) of a tenancy by the entirety which he had created before 1916, the year the first Federal estate tax statute was enacted.[6]

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[5] In the *Milliken* case, a decedent had made a gift in contemplation of death, while the Revenue Act of 1916 was in force. He did not die, however, until after the effective date of the 1918 Act. The latter statute repealed the former and imposed estate taxes at *much* higher rates. The Court held that the retroactive application of the 1918 Act was not unreasonable.

[6] The same result has been reached by four Federal courts. *Levy's Estate* v. *Commissioner,* 65 F. (2d) 412,

Particularly significant is *United States* v. *Heinszen & Co.*, 206 U. S. 370, where Congress had "ratified" the imposition of certain duties which had been theretofore illegally collected. Recovery was denied to the claimants who contended that the statute deprived them of property without due process of law. See also *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. Those cases are not to be distinguished upon any such insubstantial ground as that they involved merely a "ratification". In both there was a retroactive imposition of a liability that had not existed prior thereto, and to the extent that the question of arbitrariness under the due process clause is concerned, the issue is identical with the present case. Moreover, this Court has recognized that the *Heinszen* and *Rafferty* cases do not rest upon any such tenuous ground as the characterization of the operative statute as a "ratification"; for in *Forbes Boat Line* v. *Board of Commrs.*, 258 U. S. 338, 339, it cited those cases for the proposition that "A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power". See *Graham & Foster* v.

414 (C. C. A. 2d); *Robinson* v. *Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756; *Putnam* v. *Burnet*, 63 F. (2d) 456 (App. D. C.).

Bowers v. *Commissioner*, 90 F. (2d) 790 (C. C. A. 7th), which held to the contrary, is now pending before this Court on writ of certiorari, No. 346, present term.

Goodcell, 282 U. S. 409, 429. Compare *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8; *Citizens Nat'l Bank* v. *Kentucky,* 217 U. S. 443; *Seattle* v. *Kelleher,* 195 U. S. 351; *Locke* v. *New Orleans,* 4 Wall. 172.

Accordingly, it is clear that there cannot be any such categorical rule as that every retroactive tax or excise violates the due process clause. There must be an investigation of the circumstances, and if when everything is considered, the exaction is not arbitrary or capricious, it cannot fail for want of due process. And in the instant case, *the circumstances leading up to the enactment of the Joint Resolution of March 3, 1931, are of primary importance in determining whether the tax imposed with respect to a transfer before that date is arbitrary or capricious.*

2. *The historical setting of the Joint Resolution of March 3, 1931.* The first Federal estate tax law was enacted in the Revenue Act of 1916, c. 463, 39 Stat. 756.[1] Its scope was two-fold: (a) it imposed an excise upon the passing of property at death, and (b) it attempted also to reach certain transfers made during the lifetime of the decedent that could reasonably be regarded as substitutes for testamentary disposition. Among this latter group were irrevocable transfers made "in

[1] The Federal inheritance taxes imposed during the Spanish-American War (Act of June 13, 1898, c. 444, 30 Stat. 448) had long since been repealed (Act of April 12, 1902, c. 500, 32 Stat. 96).

contemplation of death". But Congress did not limit the *inter vivos* transfers which it taxed to gifts made in contemplation of death. It also required the inclusion of transfers "intended to take effect in possession or enjoyment at or after * * * death". Sec. 202 (b) of the Revenue Act of 1916.

That clause was not a novel one. The first death tax statute passed by a State in this country, the Pennsylvania Act of April 7, 1826 (Laws 1826, c. 72, Sec. 1), undertook to deal with property "* * * transferred by deed, grant, bargain or sale, made *or intended to take effect, in possession or enjoyment atfer the death of the grantor* or bargainor * * *". [Italics supplied.] And that provision had been construed by the Supreme Court of Pennsylvania to include a conveyance in fee of certain property including the grantor's residence where the transferee had undertaken to pay over the income to the grantor for life and to permit him the free use of the residence. *Reish, Adm'r.* v. *Commonwealth,* 106 Pa. 521.

By the time the first Federal estate tax law was enacted, this clause had appeared in substantially the same form in the death tax statutes of at least *forty* States.* And such state courts as have had

* Arizona, Laws 1912 (Special Session), c. 15, Sec. 1.
Arkansas, Acts 1901, Act 156, Sec. 1; Acts 1909, Act 303, Sec. 1.
California, Statutes 1893, c. 168, Sec. 1; Statutes 1905, c. 314, Sec. 1.

occasion to construe this clause, both before and after the enactment of the Federal law in 1916, have uniformly treated it as including a transfer

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Colorado, Laws 1901, c. 94, Sec. 23.

Connecticut, Public Acts 1889, c. 180, Sec. 1; Public Acts 1915, c. 332, Sec. 3.

Delaware, Revised Code (1915), c. 6, Sec. 146, p. 86.

Georgia, Acts 1913, p. 91.

Idaho, Laws 1907, p. 558.

Illinois, Laws 1895, p. 302; Laws 1909, p. 312.

Indiana, Laws 1913, c. 47, Sec. 1.

Iowa, Laws 1896, c. 28, Sec. 1; Laws 1911, c. 68, Sec. 1.

Kansas, General Statutes (McIntosh 1915), c. 115, Sec. 11203, Art. 7.

Kentucky, Laws 1906, p. 240, Art. XIX, §1.

Maine, Laws 1893, c. 146, Sec. 1.

Maryland, Laws 1844, c. 237, Sec. 1.

Massachusetts, Acts 1891, c. 425, Sec. 1; Acts 1907, c. 563, Sec. 1; Acts 1912, c. 678, Sec. 1.

Michigan, Pub. Acts 1899, No. 188, Sec. 1.

Minnesota, Laws 1911, c. 372, Sec. 1.

Missouri, Laws 1895, p. 278; Laws 1899, p. 328.

Montana, Laws 1897, p. 88.

Nebraska, Laws 1901, c. 54, Sec. 1; Comp. Stat. (Cobbey 1907), Sec. 11201.

Nevada, Statutes, 1913, c. 266, Sec. 1.

New Hampshire, Laws 1905, c. 40, Sec. 1.

New Jersey, Laws 1892, c. 122, Sec. 1; Laws 1909, c. 228, Sec. 1.

New York, Laws 1885, c. 483, Sec. 1; Laws 1892, c. 399, Sec. 1 (3); Laws 1896, c. 908, Sec. 220 (3).

North Dakota, Laws 1903, c. 171, Sec. 1; Laws 1913, c. 185, Sec. 1 (3).

Ohio, Laws 1893, pp. 14–15.

Oklahoma, Laws 1908, c. 81, Art. XI, Sec. 1; Laws 1915, c. 162, Sec. 1.

Oregon, Laws 1903, p. 50.

Pennsylvania, Laws 1826, c. 72, Sec. 1.

Rhode Island, Acts 1916, c. 1339, Sec. 5 (2).

in which the transferor has retained a life estate, either in form or in substance.'

A transfer with the retention of a life estate was regarded as one of the leading devices employed

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South Dakota, Laws 1905, c. 54, §1.

Tennessee, Laws 1891 (Extraordinary Session), c. 25, Sec. 6; Laws 1893, c. 174, Sec. 1.

Texas, Laws 1907, c. 21, Sec. 1.

Utah, Laws 1901, c. 62, Sec. 1.

Vermont, Laws 1896, No. 46, Sec. 1.

Washington, Laws 1901, c. 55, Sec. 1; Laws 1907, c. 217, Sec. 1.

West Virginia, Laws 1887, c. 31, Sec. 1; Laws 1907, c. 55, Sec. 1 (c); Laws 1909, c. 63, Sec. 1 (c).

Wisconsin, Laws 1903, c. 44, Sec. 1 (3).

Wyoming, Laws 1903, c. 30, Sec. 1.

' *In re Hubbs*, 41 Ariz. 466, 472–473.

Estate of Potter, 188 Cal. 55; see *Kelly* v. *Woolsey*, 177 Cal. 325, 337–338.

Blodgett v. *Guaranty Trust Co.*, 114 Conn. 207, affirmed, 287 U. S. 509; *Hackett* v. *Bankers Trust Co.*, 122 Conn. 107.

Harber v. *Whelchel*, 156 Ga. 601.

People v. *Estate of Moir*, 207 Ill. 180; *People* v. *Kelley*, 218 Ill. 509; *People* v. *Forman*, 322 Ill. 223, 229–230; *People* v. *Moses*, 363 Ill. 423.

Brown v. *Gulliford*, 181 Ia. 897, 899; *Lamb* v. *Morrow*, 140 Ia. 89, 95; *In re Estate of Toy*, 220 Ia. 825.

Crocker v. *Shaw*, 174 Mass. 266, 267; *Worcester C'y Nat. B'k* v. *Com'r. Corp'ns & Tax*, 275 Mass. 216, 220–221.

In re Kutsche's Estate, 268 Mich. 659; *People* v. *Welch's Estate*, 235 Mich. 555.

In re Estate of Marshall, 179 Minn. 233, 238; *In re Estate of Rising*, 186 Minn. 56.

In re Estate of Schuh, 66 Mont. 50, 58–61; cf. *Estate of Oppenheimer*, 75 Mont. 186.

Douglas County v. *Kountze*, 84 Neb. 506; *In re Estate of Bronzynski*, 116 Neb. 196.

In re Brockett, 111 N. J. Eq. 183; *In re Perry*, 111 N. J. Eq. 176; *In re Harvey*, 2 N. J. Misc. 247, affirmed, *sub nom.*

in the attempt to avoid death taxes. It does not seem too much to say that it was *the* type of transfer which was in fact intended to be included by this provision. Under such a transfer, the grantor remained in complete enjoyment of the property during his own lifetime, and merely provided by remainders over for its disposition thereafter. It was not particularly significant that the remainderman's rights vested *in interest* at once. What was significant was that it vested *in possession or enjoyment* only after the grantor's death. That was the situation to which statutes of this type were directed. See *Brown* v. *Gulliford,* 181 Ia. 897, 899. Thus, the Court of Appeals of New York, in con-

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Moore v. *Bugbee*, 3 N. J. Misc. 435, affirmed, 102 N. J. L. 720, writ of error dismissed, 278 U. S. 565; *Carter* v. *Bugbee*, 91 N. J. L. 438, affirmed, 92 N. J. L. 390; *American Bd. Comm'rs* v. *Bugbee*, 98 N. J. L. 84.

Matter of Green, 153 N. Y. 223; *Matter of Brandreth*, 169 N. Y. 437; *Matter of Cornell*, 170 N. Y. 423; *Matter of Keeney*, 194 N. Y. 281, affirmed, 222 U. S. 525; *Matter of Patterson*, 204 N. Y. 677, affirming 146 App. Div. 286; *Matter of Hayes*, 264 N. Y. 448; *Matter of Winters*, 135 Misc. 258; *Matter of Fitzgibbon*, 106 Misc. 130; *Matter of Egerton*, 103 Misc. 471; *Matter of Skinner*, 45 Misc. 539, modified, 106 App. Div. 217; *Matter of Masury*, 28 App. Div. 580, affirmed, 159 N. Y. 532; *Matter of Stephan*, 121 Misc. 596. See *Matter of Bullard*, 76 App. Div. 207, 209.

In re Wallace's Estate, 282 Pac. 760 (Ore.).

Reish, Adm'r v. *Commonwealth*, 106 Pa. 521; *DuBois' Appeal*, 121 Pa. 368; *Husband's Estate*, 316 Pa. 361; *Leffmann's Estate*, 312 Pa. 236; *Estate of Riddle*, 19 Philadelphia 105.

In re Romney's Estate, 60 Utah 173, 180.

In re Ellis' Estate, 169 Wash. 581.

Estate of Waite, 208 Wis. 307.

struing and applying the clause "intended to take effect in possession or enjoyment" at or after death said in *matter of Keeney,* 194 N. Y. 281, 287:

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, *but the one commonly used is a transfer with reservation of a life estate.* We think this fact justified the legislature in singling out this class of transfers as subject to a special tax. [Italics supplied.]

This decision was affirmed by this Court on the constitutional question, *Keeney* v. *New York,* 222 U. S. 525.

A reserved life estate was regarded as even more important than a power of revocation in classifying a transfer as "intended to take effect in possession or enjoyment at or after death". As the Supreme Court of Pennsylvania said in *Spangler's Estate,* 281 Pa. 118, 123, referring to *DuBois' Appeal,* 121 Pa. 368:

> That decedent reserved the right to change his beneficiaries, under the grant there being considered, was not a matter of controlling importance in that case; *the vital fact was that he retained the beneficial enjoyment of the property as long as he lived.* [Italics supplied.]

Compare *Matter of Miller,* 236 N. Y. 290.

Accordingly, when Congress employed this identical and familiar clause in the 1916 Act, it did so

advisedly. It adopted language that was rich in historical meaning. For ninety years, the States had poured into that clause a content that unmistakably included and meant primarily a transfer where the transferor had retained possession or enjoyment for his life. Thus, Congress must reasonably have felt that its use of that clause would be so understood, in the light of the familiar rule that the adoption of a statute of another jurisdiction carries with it the existing construction there placed upon it. Cf. *McDonald* v. *Hovey,* 110 U. S. 619; *Interstate Com. Commiss.* v. *B. & O. Railroad,* 145 U. S. 263, 284; *Scholey* v. *Rew,* 23 Wall. 331, 349; *Knowlton* v. *Moore,* 178 U. S. 41, 52.

The regulations of the Treasury Department repeatedly took the same view. Regulations 37 (editions of August 18, 1919, and January, 1921), Article 24;[10] Regulations 63 (1922), Article 20; Regulations 68 (1924), Article 18; Regulations 70 (1926 ed.), Article 18; Regulations 70 (1929 ed.), Article 18. Millions of dollars in taxes were collected by the Bureau of Internal Revenue over a period of about fifteen years, based upon the assumption that the clause was to be so construed. And during that period, Congress reenacted the estate tax in the Revenue Acts of 1918, 1921, 1924, and 1926, each time retaining word for word

[10] There were two earlier editions of Regulations 37 (October 10, 1916, and May 1917), which, however, were issued in skeleton form, and did not undertake to construe this clause at all.

the clause "intended to take effect in possession or enjoyment at or after his death". Under the familiar rule that the successive reenactment of a statute must be deemed to approve administrative constructions of long standing,[11] the regulations of the Treasury Department and practice of the Bureau of Internal Revenue confirmed and fortified the meaning of this clause.

When, however, the question came before this Court, it declined to give effect to the language of the clause as it had been construed by the state courts and Treasury regulations. On March 2, 1931, it held in three cases that a transfer with the retention of a life estate was not comprehended within the meaning of this clause. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784.[12]

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[11] See *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Old Mission Co.* v. *Helvering*, 293 U. S. 289 293, 294; *Burnet* v. *Brooks*, 288 U. S. 378, 392; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273.

[12] These three cases had been preceded somewhat less than a year before by *May* v. *Heiner*, 281 U. S. 238, where, pursuant to the trust created by the decedent, the income was payable *to her husband for his life*, and after his death to the decedent during her lifetime, with remainder over to their children. That case was radically different from the situations presented in the three cases of March 2, 1931. In *May* v. *Heiner*, the decedent did not retain the possession and enjoyment of the property. And it was doubtful whether she would be entitled to the use of the property even for a short period prior to her death. Accordingly, until the decisions of March 2, 1931, the Treasury Depart-

Congress was greatly disturbed by these cases. On March 3, 1931, Senator Smoot, Chairman of the Finance Committee, declared (Cong. Rec., Vol. 74, Part 7, p. 7078):

> The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision.

He voiced the common understanding that prior to these decisions the statute had generally been regarded as covering such transfers, and stated (*ibid.*):

> The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide.

On the same day, Congressman Hawley, Chairman of the House Committee on Ways and Means, addressed the House with respect to these decisions. He said (Cong. Rec., Vol. 74, Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above. * * * If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income, and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax.

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ment had never regarded *May* v. *Heiner* as a ruling upon the case of a transfer with the complete retention of possession or enjoyment by the transferor.

The Treasury Department was deeply concerned. And upon the anxious suggestions of Ogden L. Mills, Acting Secretary of the Treasury (Cong. Rec., Vol. 74, Part 7, pp. 7198–7199), Congress took the unusual step of enacting on the very day of its introduction the Joint Resolution of March 3, 1931, adding to the clause "intended to take effect in possession or enjoyment at or after his death", the following language:

> including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;

This provision was further amended by Section 803 of the Revenue Act of 1932 (*infra*, p. 39), but not in any respect material here.

3. Accordingly, when Mr. Beebe created the trust in question by the instruments of 1924 and 1926, reserving a life estate to himself, he *then* had every reason to believe that the trust would be included in his gross estate. The origin of the clause from the state statutes, the meaning which had been imparted to it by the state courts, the regulations of the Treasury Department, the fact that the Bureau of Internal Revenue was then collecting taxes from estates of decedents with respect to such transfers—these facts which he could and should have known upon consultation with his attorney when

the trust was created,[18] should have put him on notice that the Government would seek to impose a like tax with respect to his trust.

Our position does not require a reexamination of the three *per curiam* decisions of March 2, 1931. But we do contend that since a contrary result might reasonably have been anticipated in those cases, and since the Treasury was in fact attempting to collect such taxes prior thereto, the decedent had fair warning that a like tax would probably be sought from his estate. He was therefore reasonably put on notice that the Government would obtain clarifying legislation in the event that its interpretation of the statute, although having substantial foundation, should later fail to receive judicial acceptance. Under the circumstances, the application of the amendatory provisions is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 302). It is therefore not arbitrary and unreasonable within the prohibition of the due process clause.

This case is thus sharply to be distinguished from the radically different situations obtaining in *Helvering* v. *Helmholz,* 296 U. S. 93, and *White* v. *Poor,* 296 U. S. 98. The transfers there were made at a time when there could be no similar expectation that they would be subject to such a tax as was

[18] Compare the situation in the *Bullard* case, present Term, No. 349, where, in the preparation of the 1927 trust, the attorney consulted "stated in no uncertain terms" that the transfer was subject to tax. (Record in No. 349, p. 34.)

there sought to be collected. There were no provisions under existing law that could have given comparable color to a claim of taxability. A subsequently imposed tax under those circumstances did carry with it "elements of novelty and surprise" which are not present here.

The present case is more to be assimilated to *Milliken* v. *United States,* 283 U. S. 15, and *United States* v. *Heinszen & Co.,* 206 U. S. 370. It seems clear that under the facts of this case, Congress is not arbitrarily reaching back into the past. It is simply imposing a tax upon a transfer upon which the decedent had notice that he would probably be taxed.

Seattle v. *Kelleher,* 195 U. S. 351, also points the way to the solution of this controversy. There, a special assessment which had been made against certain property had been declared void. (P. 356.) The property was then sold to a bona fide purchaser without notice of any claim that it had been or might be the subject for a special assessment. Thereafter, a statute was passed, authorizing a new assessment. This Court sustained the tax as against the contention that it went beyond the constitutional guaranty of due process. Compare *Citizens Nat'l Bank* v. *Kentucky,* 217 U. S. 443, 454.

Similarly, *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8, involved a special assessment which had been void when assessed, since the state officers who undertook the improvement lacked statutory

authority with respect to both the making of the improvement and the assessment of the tax. The state legislature later "ratified", and this Court held that the tax was valid.[14]

The *Heinszen, Kelleher,* and *Charlotte Harbor Ry.* cases all show that even if the original exaction may have been wholly void, it was sufficient to put the taxpayer on notice that a later and valid tax might be imposed. Accordingly, the subsequent legislative imposition of the liability with respect to the past transaction is free of those "elements of novelty and surprise" that might otherwise render the tax whimsical and arbitrary.

A very different case would be presented if the transfer herein had been made before the enactment of the Revenue Act of 1916, before Congress had employed the clause "intended to take effect", etc. Under such circumstances, the decisions in the *Helmholz* case and *White* v. *Poor* might well be applicable, since the transfer would have been made at a time when there could be no reasonable expectation that it would be taxed.[15] Indeed, the

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[14] Under like principles, this Court has upheld special taxes for local improvements assessed a number of years after the improvements had been made and paid for, prior to any legislation purporting to authorize the assessment. *Wagner* v. *Baltimore*, 239 U. S. 207. Compare *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 534, *et seq.*; *League* v. *Texas*, 184 U. S. 156, 161; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Locke* v. *New Orleans*, 4 Wall. 172.

[15] Thus, to be sharply distinguished, are *Nichols* v. *Coolidge*, 274 U. S. 531, and *Frew* v. *Bowers*, 12 F. (2d) 625 (C. C. A. 2d), where the transfers had been made years be-

Treasury Regulations specifically disclaim any intention to tax such transfers made before September 8, 1916. See Regulations 80, Article 18 (b).

The tax in the instant case is even less open to the charge of arbitrariness or caprice than most retroactive taxes that have been sustained. The decedent lived beyond the dates of the amendatory statutes, and continued to enjoy thereafter the income from the trust created before. He could have prevented the imposition of the tax by relinquishing his life estate. What was said with respect to the holder of the special powers of appointment in *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552, is particularly apposite here:

> She lived several years after the act took effect and she was on notice of its provisions, retaining the reserved powers when she might have given them up to rid her estate of this tax liability. So there has been no denial of rights under the Fifth Amendment.

See also *Porter* v. *Commissioner,* 288 U. S. 436. Cf. *McNair* v. *Knott,* No. 32, October Term, 1937, decided December 13 ,1937.

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fore the first Federal statute which might have been applicable to them. *Bingham* v. *United States*, 296 U. S. 211, and *Industrial Trust Co.* v. *United States*, 296 U. S. 220, are similarly of a wholly different character. So too, in *Coolidge* v. *Long*, 282 U. S. 582, the transfer had been made at a time when Massachusetts was not attempting to impose such a tax with respect to gifts to lineal descendants.

Accordingly there is a complete absence of that arbitrariness that justifies invoking the due process clause, not only because the decedent *in fact* was put on full notice at the time the transfer was made that it might be taxed, but also because he had it completely within his control after the statute was passed to rid his estate of the liability by relinquishing his life interest.

II

THE STATUTE IS PLAINLY APPLICABLE TO TRUSTS CREATED BEFORE THE ENACTMENT OF THE 1931 AND 1932 AMENDMENTS

Although it is not entirely clear from the opinion of the court below whether it ruled upon the applicability of the statute to this trust (see *supra*, p. 11), it is plain from an examination of the Act that transfers made prior to its enactment are within its provisions.

Not only does the Joint Resolution of March 3, 1931, by its terms provide that it should apply "To the extent of any interest therein of which the decedent has *at any time* made a transfer, by trust or otherwise, * * *" [italics supplied], but Section 302 (h) of the Revenue Act of 1926 unequivocally states:

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the *transfers, trusts,* estates, interests, rights, powers, and relinquishment of powers, as

severally enumerated and described therein, *whether made,* created, arising, existing, exercised, or relinquished *before or after the enactment* of this Act. [Italics supplied.]

This provision is clear and explicit. It admits of no interpretation other than its plain language. A transfer made before the enactment of the applicable statutory provision is declared to come within its purview "except as otherwise specifically provided". And there is no other specific provision excluding the operation of Section 302 (h). Surely, Congress in enacting amendments to Section 302 (c) must have been aware of Section 302 (h) and would have "otherwise specifically provided", had it so intended.[16]

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[16] In *Myers* v. *Magruder*, 15 F. Supp. 488 (Md.), the court agreed that Section 302 (h) unquestionably was applicable here (pp. 493–494), but held the tax invalid as violating the Fifth Amendment. *Smith* v. *United States*, 16 F. Supp. 397 (Mass.), does not discuss Sec. 302 (h), and the opinion of the Circuit Court of Appeals for the First Circuit, which affirmed on October 22, 1937, is not further enlightening as to the reasons for striking down the tax.

The Board of Tax Appeals has not been entirely clear as to its reason for holding such transfers non-taxable. In *Whiting* v. *Commissioner*, 35 B. T. A. 100 (on appeal to the Circuit Court of Appeals for the Ninth Circuit) the Board did not even mention Section 302 (h). Similarly in *Kienbusch* v. *Commissioner*, 34 B. T. A. 1248 (on appeal to the Circuit Court of Appeals for the Second Circuit) no reference whatever was made to Section 302 (h). Two decisions of the Board relied upon *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600, where the decedent had died prior to March 3, 1931. *Schneider* v. *Commissioner*, 35

The regulations of the Treasury Department so construe the statute. Regulations 80, Article 18 (b), *infra*. That regulation supersedes an earlier declaration by the Commissioner of Internal Revenue that he would apply the amended provisions prospectively only. T. D. 4314, X–1 Cumulative Bulletin 450.[17] On the question of construction, however, there has been no inconsistency. The earlier ruling proceeded in full recognition of the language of the statute which included trusts theretofore established, but the Commissioner refrained from giving full effect to the provisions, apparently because of a view that to do so might be unconstitutional under the decisions of this Court.[18]

B. T. A. 183; *Dahl* v. *Commissioner*, 35 B. T. A. 282 (on appeal to the Circuit Court of Appeals for the Ninth Circuit). Of course, the Government is not seeking to apply the amendatory provisions of 1931 and 1932 to the estate of any decedent who died before their enactment. In that sense the amendments do not have retroactive effect, and that was all that was involved in the *Wallace* case in this connection. The Board has apparently become entangled in words: since it properly held in the *Wallace* case that the statute should not be "retroactively" applied there, it took over the same term when used in an entirely different connection and proceeded to reach the same result.

[17] The ruling in T. D. 4314 was subsequently incorporated in Regulations 70. See T. D. 4336, XI–1 Cumulative Bulletin 329.

[18] The Commissioner stated that "*notwithstanding the provisions of Section 302 (h)*" he would apply the amendment prospectively only, "in view of" certain decisions of this Court, which ruled primarily upon, or contained implications concerning, the constitutionality of a retroactive application of the statute. T. D. 4314, X–1 Cumulative Bulletin 451. Thus T. D. 4314 clearly recognizes that Sec-

Even if that earlier ruling had been allowed to remain in effect, as it was not, it could not serve to fetter judicial examination of the underlying constitutional question, for "the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application." *Helvering* v. *Powers,* 293 U. S. 214, 224. And even if the earlier ruling were to be regarded as an interpretation of the statutory language, it could have no greater force, in view of the superseding regulation, than the reasons that might be adduced to support it. Cf. *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 133–135.

The provisions of Section 302 (h) are so plain and unambiguous that to make them inapplicable here would require a tortured interpretation that could be extracted only by a *tour de force.* What was said with respect to an analogous situation in *Helvering* v. *City Bank Co.,* 296 U. S. 85, 89, is particularly persuasive here:

> We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can

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tion 302 (h) makes the provisions of Section 302 (c) applicable to transfers made before March 3, 1931, but undertakes, merely because of the constitutional doubts of the then officers of the Treasury, to refrain from applying Section 302 (c) retroactively, "notwithstanding the provisions of Section 302 (h)." As to the constitutional question, we respectfully refer the Court to our discussion, pp. 12–32, *supra.*

be no doubt of the meaning of the words used. The section applies to this transfer.[19]

Cf. *Nardone* v. *United States,* No. 190, October Term, 1937, decided December 20, 1937.

Accordingly, we submit that the challenged statute is not only a valid exercise of Federal power, but also that Congress plainly intended its application to a transfer such as is involved in the present case. The language of Judge Learned Hand in *Cohan* v. *Commissioner,* 39 F. (2d) 540, 545 (C. C. A. 2d), is particularly apt here:

> So it does not seem to us that the situation here calls for so heroic a remedy as to declare the statute unconstitutional, nor indeed for the lesser one of wringing the words out of their natural meaning.

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[19] Thus under the *City Bank Co.* decision, *supra,* it would not be proper to refer to the Congressional debate, attendant the passage of the Joint Resolution on the question of construing a statute plain upon its face. But even if they are examined, it will be seen that they do not support the respondent's contentions as to the applicability of these provisions to transfers made before March 3, 1931. Both the Treasury and Congress were very much disturbed over the fact that the three decisions of March 2, 1931, would result in refunds of about $25,000,000 with respect to taxes collected from estates of transferors *already deceased.* There was some question as to whether Congress would seek to prevent those refunds, and in deciding not to do so there were several statements made on the floor of the House that the statute would not be "retroactive". That the term was employed in this broad sense rather than in the more restricted sense in which it is employed here, is made clear beyond question upon a *full* reading of those debates. See Cong. Rec., Vol. 74, Part 7, pp. 7078–7079, 7198–7199.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1937.

APPENDIX

As originally enacted, Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provided:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

The Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, amended subsection (c) to read as follows (the language in italics representing the new matter):

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the*

property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411 (c).)

Section 302 (c) was further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to read as follows:

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411.)

Section 302 (h) of the Revenue Act of 1926, *supra:*

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f),

and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

Regulations 80 (1934):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Regulations 70 (1929 Edition):

ART. 18. *Reservation of income or an annuity.*—A transfer, not amounting to a bona fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.

* * * * *

Article 18 of Regulations 70 (1926 Edition), and of Regulations 68 (1924) contains in substantially the same language the foregoing provisions of Article 18 of Regulations 70 (1929 Edition).

Regulations 63 (1922):

ART. 20. *Reservation of income.*—A transfer, not amounting to a bona fide sale for a fair consideration in money or money's worth, is taxable where the decedent reserved to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate. Where the decedent reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserved an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the decedent reserved the annuity out of the property conveyed, or payment thereof to him was made by the grantee upon an express or an implied agreement to that effect. * * *

Regulations 37 (1921 Edition):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate.

> Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. * * *

Regulations 37 (1919 Edition), Article 24, contains provisions identical with the foregoing.

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